

CHAPTER 10

CRIMINAL LAW

REFERENCES

1. Manual for Courts-Martial (2000).
2. Army Regulation 27-10, Military Justice, 20 August 1999.
3. Air Force Instruction 51-201, Administration of Military Justice, 3 October 1997.
4. Air Force Instruction 51-202, Nonjudicial Punishment, 1 October 1996.
5. JAGINST 5800.7C w/chgs 1-3, Manual of the Judge Advocate General (JAGMAN), 3 October 1990.
6. Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers, 30 September 1996.
7. Army Regulation 220-5, Designation, Classification, and Change in Status of Units, 3 September 1991.
8. JP 1-02, DoD Dictionary of Military and Associated Terms, 23 March 1994.
9. FM 27-100, Legal Support to Operations, 1 March 2000.

Judge advocates must ensure efficient and expeditious processing of military justice actions (courts, NJP and administrative separations) in the deployed setting. This obligation exists throughout the spectrum of operations, to include training exercises, emergency relief operations, peacekeeping/making operations and war itself. At the same time, however, judge advocates must maintain the same level of efficiency in rear detachment military justice actions.

I. MILITARY JUSTICE DURING DEPLOYMENT PHASES

FM 27-100 lists four phases in military operations: premobilization, predeployment / mobilization, deployment, and redeployment / demobilization. Different military justice concerns should be addressed at each stage of the operation. Watch out for the “field due process” myth. Court-martial and NJP procedures remain largely unchanged in a deployed setting.

A. Premobilization Considerations.

During premobilization, the actual deployment mission and location have not been identified. The primary focus is planning and identifying possible issues. Military justice supervisors should designate personnel and equipment available for deployments and ensure such personnel have been trained to the greatest extent possible.

Preparation of key personnel for deployment. Successful management of military justice actions during a deployment requires planning and training of key personnel. The size of the deployment will often dictate who deploys from a legal office. Regardless of the deployment scale, supervisors must ensure potentially deployable judge advocates know how to process military justice actions on their own, *before* deployment. Deployed settings present difficult supervisory challenges, primarily caused by increased distances between judge advocates, communication and transportation limitations, and “imported” counsel (judge advocates from legal assistance, administrative law or claims) that may be inexperienced with military justice actions. Supervisors must therefore attempt to identify and train potentially deployable judge advocates before deployment in the following areas: AR 15-6 investigations, NJP procedures, court-martial procedures and administrative separations.

Identification/marshaling resources to conduct operations. Resources, to include electricity, phone lines and fax capability are ordinarily limited in deployed settings. Judge advocates must ensure possession of the required regulations and legal forms in electronic format (e.g. LAAWS XII CD-ROM, 1 JAN 02, a comprehensive 7 disk set) and hard copy. Computers may help to eliminate the need for some hard copy resources. However, given their potential unreliability in the harsh environment of a deployment, judge advocates must plan for the worst. Past Army deployments have demonstrated the need to deploy with a hardbound set of reporters for the prosecution of courts-martial in the field. Other essential publications include the Manual for Courts-Martial, AR 27-10 and any relevant 27-10 supplements, AR 15-6,

the enlisted and officer ranks updates, a Military Rules of Evidence hornbook, a Basic Course Criminal Law Deskbook and the Crimes and Defenses Deskbook. Many of these resources can be accessed on the JAGCNet (<http://www.jagcnet.army.mil/>).

B. Predeployment / Mobilization Considerations.

During predeployment / mobilization, a mission and deployment location have been identified. The military justice supervisor and counsel must execute the military justice transition and conduct mission training to prepare for the deployment. Transition tasks may include:

1. Designating / aligning the convening authority structure for the deployment theater and home station.

Command and control relationships are becoming increasingly complex. Brigade combat teams may deploy in whole or part supported by slice elements and personnel who may be supplied by sister units, sister services or civilian contractors. The convening authority (CA) has three broad options available with regard to handling military justice actions. The CA may exercise his military justice authority over all units from the deployed location. Alternatively, the CA may remain in the rear and exercise his military justice authority from that location. Finally, the CA may elect to place deployed or stay-behind units under the administrative control of separate convening authorities.¹

If the CA deploys and elects to leave all or some CA authority in the rear, or vice versa, coordination must be made (see paragraphs a and b below). Although most CONUS installations have a residual GCM authority already designated in the Installation Commander pursuant to Department of the Army General Order, when this authority is not present, judge advocates should coordinate with The Office of The Judge Advocate General, Criminal Law ((703) 588-6776) for Secretarial designation of a new GCMCA. Cases should be transferred to the new convening authorities when necessary. See sample of transfer of jurisdiction at the end of this chapter.

NOTE: The term “jurisdiction” is being used to describe venue (which commander should act as a convening authority in a given case), not to describe a court-martial’s legal authority to render a binding verdict and sentence. Under the UCMJ any CA may refer any case to trial (see RCM 601(b) *discussion*). However, as a matter of policy JAs should ensure the CA with administrative control (ADCON)² over the accused servicemember exercises primary UCMJ authority. Absent clear command guidance ADCON can be an elusive concept. AR 27-10, para 3-8, lists specific language that should be included in attachment orders to indicate a soldier is attached to a unit for the purpose of Article 15.³ See *United States v. Egan*,⁴ for an example of a case where an Air Force commander referred a soldier’s case to trial by a special court-martial convened within a joint force (EUCOM) after the soldier’s Army chain of command decided not to refer the case to trial.

a. *Ensuring units are assigned / attached to the appropriate organization for administration of military justice (ADCON).* Initially, unit commanders at all levels must determine which units, or portions of units, will deploy or

¹ As defined in Articles 22, 23 and 24, UCMJ.

² Administrative control (ADCON as opposed to OPCODE, operational control) is defined in JP 1-02 and FM 27-100 as follows:

JP 1-02 — Direction or exercise of authority over subordinate or other organizations in respect to administration and support, including organization of Service forces, control of resources and equipment, personnel management, unit logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.

FM 27-100 — Administrative Control (ADCON) is the direction or exercise of authority necessary to fulfill military department statutory responsibilities for administration and support. ADCON may be delegated to and exercised by service commanders at any echelon at or below the service component command. The secretaries of military departments are responsible for the administration and support of their forces assigned or attached to unified commands. The secretaries fulfill this responsibility by exercising ADCON through the service component commander of the unified command. ADCON is subject to the command authority of the combatant commander.

³ AR 27-10, para 3-8.a.(4), “If orders of directives include such terms as “attached for administration of military justice,” or simply “attached for administration,” the individual so attached will be considered to be of the command, of the commander, of the unit of attachment for the purpose of Article 15.” Note however, the regulatory authority to impose NJP under AR 27-10 differs from the statutory authority to act as a CA under the UCMJ. A rear detachment OIC could impose NJP by virtue of having “primary command authority” as described in para 3-7.a.(1). The same officer would need to be a commander of a unit (to include p-units) in order to act as a CA under Articles 22, 23 or 24, UCMJ.

⁴ 53 M.J. 570 (Army Ct. Crim. App. 2000).

remain in the rear. For example, a deploying company may deploy with a previously unrelated battalion. This may create the need for orders attaching the company to the deploying battalion. It may also be necessary to create provisional units (p-units)⁵ to support the deployment. This is because non-deploying soldiers may either be attached to previously unrelated units or to p-units during the period of deployment. If the commander decides to create a rear detachment, staffed by non-deploying soldiers, the rear detachment will be integrated into a new or existing chain of command. For the rear detachment OIC “commander” to command and acquire CA status under the UCMJ, the rear detachment must be a unit IAW service regulations (e.g. create a p-unit IAW AR 220-5).

b. *Ensuring individuals are assigned/attached to the appropriate organization for administration of military justice (ADCON).* All soldiers, whether deploying or not, should be assigned or attached to a unit that can dispose of criminal and administrative actions that may arise during the deployment period. The unit adjutant should initiate a request for orders to attach non-deploying soldiers to a unit remaining at the post, camp, or station. Commanders must identify non-deployable soldiers within the unit.

TCs should monitor the status of those soldiers within their jurisdiction who may be non-deployable for legal reasons. Judicial action by military or civil authorities, while generally making a soldier non-deployable for exercises, may not bar deployment for actual combat operations. The unit adjutant should initiate procedures to obtain the release of soldiers in confinement whom the commander requests be made available for deployment. TCs should also advise commanders of those soldiers who are not themselves the subject of legal action, but who are required to participate in legal proceedings (such as witnesses or court or board members). The decision as to whether these soldiers will deploy is the commander’s, usually made after coordination with the TC.

c. *Selection of court-martial panel, if necessary, in the deployment theater and rear detachment.* Supervisory judge advocates must plan for new panel selection for both the rear garrison and the deployed setting. Brigade judge advocates should also consider establishing “straight” special court-martial panels in theater to provide an expeditious forum for resolution of NJP refusals and other low-level misconduct. Judge advocates should also familiarize themselves with a legally sound selection process and deploy with prepared panel selection advice.

d. *Guidance for disposing of pending cases upon deployment.* Judge advocates must consider whether to take pending actions to the deployed setting or leave them in garrison. For courts-martial this will largely be a function of the seriousness of the offense and whether the witnesses are primarily civilian or military. Serious criminal offenses or cases with primarily civilian witnesses often remain in the rear. Similarly, soldiers pending administrative separation normally should remain in garrison pending separation. NJP actions normally go forward with the deploying force.

2. Draft and publish a general order for the operation.

a. *Draft a general order for the operation.* Based upon mission requirements and command guidance, military justice supervisors and trial counsel must draft the general order (GO) for the operation and have it ready for

⁵ Provisional units (p-units) are temporary units (not to exceed 2 years) composed of personnel detached from their unit of assignment and created under authority of AR 220-5, 3 Sep. 91. Provisional units are often used to create a UCMJ structure or fill the gaps in UCMJ authority or convening authority. They help to ensure that commanders at all levels are available to process UCMJ and administrative actions. Commanders decide whether or not p-units will be “organized,” and if so, to what unit they will be attached. This should be done in consultation with the S1 and the judge advocate. When a unit deploys, it normally leaves behind individuals or portions of the unit. Those elements can either be attached to another preexisting unit remaining in the rear or a p-unit can be created at the commander’s discretion. Provisional units can be created at any level, to include company, battalion, and brigade. Deploying elements may also need to provisionalize depending upon whether a portion of the unit is deploying and / or whether the commander of the original unit is deploying as the commander of that unit, that is, the commander “takes his flag” to the deployed setting.

The S1/PSC is normally the staff element responsible for executing the commander’s intent by processing the documents that “organize” and “attach” p-units. JAs must assist in this process to ensure a UCMJ command structure exists, and that this structure continues the sensible flow of UCMJ actions. Provisional units must have a commander on orders. Such commanders must be commissioned officers (including commissioned warrant officers). They have normal UCMJ authority. Check local military justice supplements to identify modifications or reservations of authority in this regard.

Judge advocates must monitor the PSC publication of orders that “organize” and then “attach” p-units to other units. This process is typically initiated by the commander submitting a request for orders to “organize” a p-unit, and then a second RFO to “attach” the unit to a “parent” unit. Often, given the volume of units deployed and p-units organized and the delay in publication of orders, it is sometimes more efficient to publish a regulation or General Order which sets out the jurisdictional scheme for both forward and rear area elements. This ensures all commanders and units, especially newly attached units, are aware of their “food chain.”

publication as soon as possible. See examples at this end of this chapter (GOs for operations in Desert Shield, Haiti, and Allied Force).

b. *Publish a general order for the operation.* The GO must be published and disseminated to all soldiers prior to deployment. Violations of a properly published GO may be punished under Article 92, UCMJ. Although the government need not prove knowledge of a lawful GO as an element of the offense, the contents of the general order should be aggressively briefed to all deploying soldiers.

c. *Conducting mission training / predeployment briefings.* Judge advocates must be thoroughly familiar with the GO for the operation and must provide extensive briefings prior to deployment. As with ROE training, supervisory judge advocates must ensure all members of the command understand the commander's intent. Refresher training on the GO (and ROE) upon arrival in theater, and at regular intervals throughout the deployment, are critical tasks.

3. In addition, judge advocates must ensure the availability of services and resources, to include:

a. *Trial defense and judiciary services.* Deployment support from trial defense and judiciary services must be coordinated at this time.

b. *Confinement Facility.* With the exception of the Vietnam War, Army forces have typically not maintained confinement facilities in theater for U.S. personnel. Although jails run by US or U.N. forces may exist for local nationals, they are not intended, and generally should not be used, for holding US military personnel. When pretrial confinement is necessary, the soldier is normally shipped to the rear (Mannheim, Germany or CONUS).

c. *Urinalysis Testing.* Based upon mission requirements and command guidance, judge advocates should ensure units have the ability to conduct urinalysis testing in theater. Inevitably, contraband finds its way to the deployed setting. At a minimum, the commander should have the option to conduct a urinalysis. Coordination should be made with unit ADCOs, the Installation Biochemical Testing Coordinator and the relevant stateside lab prior to deployment. Fort Meade Drug Testing Lab: (301) 677-7085 / Tripler Drug Testing Lab: (808) 433-5176.

d. *Dogs.* Judge advocates must also consider the advisability of bringing canine support, to include drug and explosive detection capable dogs. In addition to the drug support, dogs are able to assist in force protection efforts.

C. Deployment Considerations.

During deployment, the military justice supervisor must ensure the following is accomplished:

Ensure orders assigning units and personnel clearly indicate which commanders have nonjudicial punishment and court-martial authority. This is an ongoing process, as new soldiers (and possibly members from other services) will be incoming to the command. This requires coordination with the appropriate G1/S1 personnel staff elements.

Conduct training in military justice for rear detachment OICs/commanders. A military justice supervisor in the rear detachment should prepare for military justice challenges in the rear because of fewer resources available. Also the supervisor should expect that rear detachment commanders have little to no experience in military justice actions and will need training and guidance, particularly in areas such as unlawful command influence. Rear detachment military justice supervisors must plan for and prepare legal briefings for all new OICs/commanders in the rear detachment and additional training as necessary.

D. Redeployment / Demobilization Considerations.

During redeployment/demobilization, the military justice supervisor must ensure the following is accomplished: 1) return to the original convening authority structure; 2) units and personnel are assigned/attached back to appropriate organizations for administration of military justice; 3) designations of home station convening authorities are revoked; 4) individual cases are transferred to appropriate jurisdictions; and 5) the general order for the operation is rescinded.

II. JOINT OPERATIONS

A. Courts-Martial.

Reciprocal Jurisdiction. Commanders may refer court-martial cases on personnel of other services assigned or attached to their unit.⁶ For example, in *United States v. Egan*,⁷ an Air Force commander referred a soldier's case to trial by a special court-martial. The TC was Air Force, the DCs were Army and Air Force and the military judge was Army. On appeal, the Army Court of Criminal Appeals reviewed the case. Due to the lack of specific language in EUCOM regulations, the Army court held that the Air Force CA was unable to approve a bad conduct discharge, because he did not forward the case to a GCMCA for referral (even though Air Force SPCMCAs have the authority to refer BCD special cases to trial).

B. Nonjudicial Punishment.

Reciprocal Jurisdiction. Army commanders may impose NJP on personnel of other services assigned or attached to the unit.⁸ Another option in a joint command is to designate a service representative to administer NJP to members of their service.

Postponement of Punishment. Where deployed soldiers are already required to remain in small compounds, is restriction a viable punishment? AR 27-10, para. 3-21 allows commanders to postpone imposition of punishment. This provision contemplates such delay will not normally exceed 30 days. The intent is likely to ensure swift punishment consistent with the purposes of Article 15, UCMJ. In cases where the commander desires a delay in excess of 30 days, judge advocates should coordinate with their supervisory judge advocate. The regulation is silent as to the lawfulness or propriety of such a course of action. In any event, judge advocates must ensure the soldier is notified of the commander's intent to delay imposition. This should be reflected on the DA Form 2627.

III. CRIMINAL LAW ISSUES DURING COMBAT OPERATIONS

This section addresses criminal law problems associated with combat and, specifically, wartime-related offenses.

A. Time of War. The existence of a "time of war" is relevant to many criminal law matters: certain offenses can only occur in time of war, other offenses are punishable by death only in time of war, time of war is an aggravating factor in still other offenses, and court-martial jurisdiction will exist over civilians who are "accompanying the force in the field." Time of war, however, is defined in a variety of ways that depend upon the purpose of the specific article in which the phrase appears, and on the circumstances surrounding the application of the article.

The MCM defines "time of war" as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists." The definition applies only to the following portions of the MCM: the aggravating circumstances that must be present to impose the death penalty (R.C.M. 1004(c)(6)), the punitive articles (MCM, Part IV), and nonjudicial punishment (MCM, Part V). It does not apply to statute of limitations and/or jurisdiction over civilians.

B. Offenses that can only occur during time of war:

1. Improper use of a countersign (UCMJ art. 101) prohibits disclosing the parole or countersign to one not entitled to receive it and giving a parole or countersign different from that authorized by the command.

⁶ See UCMJ art. 17 (2000) and R.C.M. 201(e).

⁷ 53 M.J. 570 (Army Ct. Crim. App. 2000).

⁸ However, the commander must do so IAW the individual's parent service regulation (AFI 51-202, para 2, 2.2.1; Navy and Marine JAGMAN 0106d; Coast Guard MJM, Art 1-A-3(c)). See AR 27-10, para 3-8c. JAs must note certain differences in procedures. For AF personnel, a joint commander may only impose NJP on AF personnel if the offense "arises from a joint origin or has joint forces implications." Other service procedures must also be followed. For example, the AF provides 72 hours to consult with counsel. The Navy/Marine burden of proof is a preponderance of the evidence. Also, appeals typically proceed through the servicemember's parent service. Coordination, therefore, must be made with the servicing judge advocate. This list of procedural differences is not exhaustive. JAs should consider consultation with other service JAs to understand the impact of NJP on other service personnel.

2. Misconduct as a prisoner (UCMJ art. 105) makes it criminal to improve one's position as a prisoner (a) to the detriment of other prisoners⁹ and (b) contrary to law, custom or regulation. Art. 105 also makes criminal the maltreatment of prisoners while the accused is in a position of authority.

3. Spying (UCMJ art. 106) imposes a mandatory death penalty upon those who lurk, act under false pretenses to collect, or attempt to collect information for conveyance to the enemy.¹⁰

C. Offenses that can be punished by the death penalty only in time of war:

1. Desertion (UCMJ art. 85)¹¹ with intent to remain away permanently, shirk important service, or avoid hazardous duty *may* be punished by death in time of war.

2. Assaulting or Willfully Disobeying a Superior Commissioned Officer (UCMJ art. 90).

3. Misbehavior of Sentinel or Lookout (UCMJ art. 113), such as being found drunk or asleep on their post, or leaving it before proper relief, *may* be punished by death in time of war.

D. Time of War as an Aggravating Factor.

1. Homicide and rape are both capital offenses in time of war as well as at other times. RCM 1004 provides that it is an aggravating factor sufficient to justify a death sentence that the rape or homicide was committed in time of war *and* in territory in which the U.S. or an ally was then an occupying power or in which U.S. forces were then engaged in active hostilities.

2. The maximum penalty that may be imposed by court-martial is increased in time of war for drug offenses, malingering, and loitering/wrongfully sitting on post by sentinel/lookout.

3. The maximum period of confinement *may* be suspended in time of war for solicitation to desert, mutiny, misbehavior before the enemy, or sedition.

E. Time of War and Nonjudicial Punishment. A commander in the grade of major/lieutenant commander or above may reduce enlisted members above the pay grade E-4 *two* grades in time of war *if* the Service Secretary has determined that circumstances require the removal of peacetime limits on the commander's reduction authority. *See* MCM, pt. V, para. 5b(2)(B)(iv).

F. "Time of War" for Jurisdiction, and Statutes of Limitation. Jurisdictional rules and statutes of limitation may both be affected by a determination that a time of war exists. As stated previously, "time of war" is defined differently for jurisdiction and statutes of limitations purposes than it is for aggravating factors for a capital case, the punitive articles, and nonjudicial punishment.

1. Jurisdiction. UCMJ art. 2(a)(10) provides that in time of war, persons "serving with or accompanying an armed force in the field" may be subject to trial by court-martial. In the case *U.S. v. Averette*, 41 C.M.R. 363 (1970), the Court of Military Appeals (CMA) held that for purposes of providing jurisdiction over persons accompanying the armed forces in the field in time of war, the words "in time of war" mean a war formally declared by Congress. NOTE: The Military Extraterritorial Jurisdiction Act of 2000¹² may expand criminal jurisdiction to cover civilians accompanying the Armed Forces overseas in peacetime. This legislation has not yet taken effect, however, because a DoD regulation

⁹ For example, reporting plans of escape, secret food and arms caches, etc. An escape that causes injury to fellow prisoners does not fall within the ambit of this offense.

¹⁰ UCMJ art. 106. Spying does not violate the law of war. "Spies are punished, not as violators of the law of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible." (FM 27-10, para. 77).

¹¹ The last execution for desertion occurred during World War II. See Slovik, E. Theater of Operations CMCO No. 5555.

¹² Codified at 18 U.S.C. §§ 3261-67.

governing apprehension, detention, delivery and removal of persons to the U.S. (for trial in Federal District Court) has not been submitted to the Senate and House Judiciary Committees.

2. Statutes of Limitation. UCMJ art. 43 extends the statute of limitations for certain offenses committed in time of war.¹³

a. There are no statutes of limitation for the crimes of Desertion, Absence Without Leave, Aiding the Enemy, Mutiny, Murder, or Rape in time of war, and persons accused of these crimes may be tried and punished anytime. (UCMJ art. 43(a)).

b. The President or Service Secretary may certify particular offenses that should not go to trial during a time of war if prosecution would be inimical to national security or detrimental to the war effort; statute of limitations may be extended to six months after the end of hostilities. (UCMJ art. 43(c)).

c. The statute of limitations is also suspended for three years after the end of hostilities for offenses involving fraud, real property, and contracts with the United States.¹⁴

In determining whether “time of war” exists for statute of limitations purposes, CMA held that the conflict in Vietnam, though not formally declared a war by Congress, was a “time of war.”¹⁵ Military courts have articulated factors it will look to in making such an analysis, to include whether there are armed hostilities against an organized enemy¹⁶ and whether legislation, executive orders, or proclamations concerning the hostilities are indicative of a time of war.¹⁷

Military courts have also rejected the notion that there is a geographical component to the “time of war” in the sense that absence from the combat zone at the time of an offense does not prevent the offense from occurring in “time of war.”¹⁸ For example, in a case in which an accused absented himself without leave from Fort Lewis, Washington, during the Korean conflict, CMA held that the Korean conflict was a war within the meaning of UCMJ, art. 43(a) and that the accused’s geographical location at the time of the offense was irrelevant. “In either instance, the Armed Forces are deprived of a necessary—perhaps vitally necessary—combat replacement.”¹⁹

IV. WARTIME OFFENSES

Certain violations of the UCMJ penalize conduct unique to a combat environment. As described above, several offenses may occur only in time of war or have increased punishments in time of war. The following crimes need not occur in time of war to be criminal, but they have elements that may occur only in a wartime situation.

A. Misbehavior Before the Enemy. Art. 99, UCMJ, is an amalgamation of nine different offenses and is meant to cover all offenses of misbehavior before the enemy. UCMJ, article 134 is not a catch-all designed to apply to these types of violations. Each of these crimes must be committed before, or in the presence of, the enemy.

“Enemy” Defined. Enemy includes forces of the enemy in time of war, or any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations.²⁰

¹³ CMA held that Vietnam was a time of war for statute of limitations purposes. *U.S. v. Anderson*, 38 C.M.R. 386 (1968).

¹⁴ UCMJ art. 43(f). The date hostilities end is proclaimed by the President or established by a joint resolution in Congress.

¹⁵ *U.S. v. Anderson*, 38 C.M.R. 386 (1968).

¹⁶ *U.S. v. Shell*, 23 C.M.R. 110 (1957).

¹⁷ *U.S. v. Bancroft*, 11 CMR 3 (1963).

¹⁸ *U.S. v. Averette*, 41 C.M.R. 363 (1970).

¹⁹ *U.S. v. Ayers*, 15 C.M.R., at 227 (1954).

²⁰ *U.S. v. Monday*, 36 C.M.R. 711 (A.B.R. 1966), pet. denied, 37 C.M.R. 471 (C.M.A. 1969)

“Before the Enemy” Defined. To be before, or in the presence of, the enemy, one must stand in close tactical, not physical, proximity to the foe. CMA has defined the concept as follows:

It may not be possible to carve out a general rule to fit all situations, but if an organization is in a position ready to participate in either an offensive or defensive battle, and its weapons are capable of delivering fire on the enemy within effective range of the enemy weapons, then that unit is before the enemy.²¹

In applying this definition, courts have held that a member of a front line platoon, a member of a mortar unit supporting friendly troops, and a soldier running away near friendly artillery units less than six miles from the front lines were all “before the enemy.” The definition and the court interpretations make this element dependent upon the circumstances surrounding the offense and leave the issue to the trier of fact.²²

B. “Before the Enemy” Offenses.

1. An accused is guilty of **running away** if, without authority, he leaves his place of duty to avoid actual or impending combat. He need not actually run, but must only make an unauthorized departure.

2. **Shamefully abandoning, surrendering, or delivering up command** punishes cowardly conduct of commanders who, without justification, give up their commands. Only the utmost necessity or extremity can justify such acts.

3. An accused **endangers the safety of a command** when, through disobedience, neglect, or intentional misconduct, he puts the safety of the command in peril.

4. Soldiers may not **cast away arms or ammunition before the enemy** for any reason. It is immaterial whether the accused acted to aid himself in running away, to relieve fatigue, or to show his disgust with the war effort.

5. **Cowardly conduct** consists of an act of cowardice, precipitated by fear, which occurs in the presence of the enemy. The mere display of the natural feeling of apprehension before, or during, battle does not violate this article; the gravamen of this crime is the accused’s refusal to perform his duties or abandonment of duties because of fear.²³

6. **Quitting one’s place of duty to plunder or pillage** occurs when an accused leaves his place of duty with the intent to unlawfully seize public or private property. It is enough that the accused quit his duty with the specified purpose; he need not ever actually plunder or pillage to violate this subdivision of the article.

7. **Causing false alarms** includes the giving of false alarms or signals, as well as spreading false or disturbing rumors or reports. It must be proven that a false alarm was issued by the accused and that he did so without reasonable justification or excuse.

8. An accused **willfully fails to do his utmost to encounter the enemy** when he has a duty to do so and does not do everything he can to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels or aircraft. An example of this offense might be a willful refusal to go on a combat patrol.

9. The **failure to afford relief and assistance** involves situations where friendly troops, vessels or aircraft are engaged in battle and require relief or assistance. The accused must be in a position to provide this relief without endangering his own mission and must fail to do so. The accused’s own specific tasks and mission limit the practicable relief and assistance he can give in a particular battle situation.

²¹ U.S. v. Sperland, 5 C.M.R. 89, 91 (1952).

²² During Urgent Fury, a soldier who refused to board a plane at Pope Army Airfield (Ft. Bragg) was charged with misbehavior before the enemy. The judge dismissed the charge (not “before the enemy”). The accused was convicted of missing movement by design.

²³ See U.S. v. Smith, 7 C.M.R. 73 (A.B.R. 1953), and U.S. v. Barnett, 3 C.M.R. 248 (A.B.R. 1951).

C. War Trophies. Soldiers must give notice and turn over to the proper authorities, without delay, all captured or abandoned enemy property. Individuals failing to adhere to this requirement can be punished for three separate acts.

1. Failing to give notice or turn over property.²⁴
2. Buying, selling, trading, or in any way disposing of, captured or abandoned property.
3. Engaging in looting or pillaging. Violation of 26 U.S.C. §§ 5844, 5861 (unlawful importation, transfer, and sale of a dangerous firearm) may be charged as violations of clause three, UCMJ art. 134.

D. Private Property. As a general rule, private property may always be requisitioned or destroyed if military necessity so requires. The goal during combat is to avoid unnecessary destruction of such property, as well as disciplinary problems, by training soldiers in the law regarding private property. This training will aid the commander in accounting for property and in paying for only proper claims.

1. **Wrongful destruction of private property.** UCMJ, art. 109 prohibits willful or reckless destruction or damage to private property and carries a maximum punishment of a dishonorable discharge, total forfeitures, and confinement for five years.

2. **Wrongful taking of private property.** UCMJ, art. 121. There are no provisions in this article that apply *specifically* to wartime situations. The maximum punishment for violation of this provision is dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

E. Analysis of Other Potential Wartime Offenses.

1. **Mutiny or Sedition** (UCMJ art. 94). Mutiny and sedition consist of four separate offenses, all of which require the endangerment of established military or civilian authority. Neither mutiny nor sedition has to occur during “time of war” to be punishable by death.

Mutiny requires an intent to usurp or override military authority and can be committed by either creating violence or a disturbance or by refusing to obey orders or perform duties. While creating violence or a disturbance can be accomplished either alone or with others, a refusal to obey orders or perform duties requires a concert of purpose among two or more people to resist lawful military authority. The resistance may be nonviolent or unpremeditated and may consist only of a persistent refusal to obey orders or to perform duties.

Sedition is a separate offense and requires a concert of action among two or more people to resist civil authority through violence or disturbance. Failure to prevent, suppress, or report a mutiny or sedition also constitutes a crime.

Failure to prevent these acts requires that the mutiny or sedition took place in the accused’s presence and that he failed to do his utmost to prevent and suppress the insurrection. If the accused fails to use the force, to include deadly force, necessary to quell the disturbance under the circumstances, he has failed to do his utmost.

Failure to take all reasonable means to inform his superiors of an offense of mutiny or sedition, which he had reason to believe was taking place, is the fourth offense under article 94. One must take the most expeditious means available to report the crime. Whether he had reason to believe these acts were occurring is judged by the standard of the response of a “reasonable person” in similar circumstances.

2. **Subordinate Compelling Surrender** (UCMJ art. 100). The death penalty can be given for the offense of compelling a commander to surrender, an attempt to compel surrender, and for striking the colors or flag to any enemy without proper authority. **Compelling surrender** involves the commission of an overt act by the accused that was intended to, and did, compel the commander of a certain place, vessel, aircraft or other military organization to give it up to the enemy or to abandon it. An attempt is comprised of the same elements, except the act must only “apparently tend”

²⁴ See U.S. v. Morrison, 492 F.2d 1219 (1974). Captured or abandoned property (here, money) discovered during wartime becomes the property of the government whose forces made the discovery.

to bring about the compulsion of surrender or abandonment, and the overt act must amount to more than mere preparation. These offenses are similar to mutiny, except that no concert of purpose is required to be found guilty. **Striking the colors or the flag** requires that the accused make, or be responsible for, some unauthorized offer of surrender to the enemy. The offer to surrender can take any form and need not be communicated to the enemy. Sending a messenger to the enemy with an offer of surrender is sufficient to constitute the offense; it is not necessary for the enemy to receive it.

3. Improper Use of Countersign (UCMJ art. 101). A countersign is a word or procedure used by sentries to identify those who cross friendly lines; the parole is a word to check the countersign and is given only to those who check the guards and the commanders of the guards. Two separate offenses fall within the ambit of article 101: **disclosing the parole or countersign to one not entitled to receive it and giving a parole or countersign different from that authorized**. Those authorized to receive the parole and countersign must be determined by the peculiar circumstances and orders under which the accused was acting at a particular time. Revealing these procedures or words is done at one's peril, despite the intent or motive at the time of disclosure. Negligence or inadvertence is no defense to the crime, nor is it excusable that the accused did not know the person to whom the countersign or parole was given was not entitled to receive it.

4. Forcing a Safeguard (UCMJ art. 102). A **safeguard** is a guard detail or written order established by a commander for the protection of enemy and neutral persons, places, or property. The purpose of a safeguard is to pledge the honor of the nation that the person or property will be respected by U.S. forces. A belligerent may not employ a safeguard to protect its own forces. A safeguard may not be established by the posting of guards or off-limits signs unless a commander takes those actions necessary to protect enemy or neutral persons or property. This offense is committed when one violates the safeguard and he knew, or should have known, of its existence. Any trespass of the safeguard is a violation of this article.

5. Aiding the Enemy (UCMJ art. 104). *Five separate acts* are made punishable by this article: aiding the enemy, attempting to aid the enemy, harboring or protecting the enemy, giving intelligence to the enemy, and communicating with the enemy. Although this article does not prohibit aiding prisoners of war, it does prohibit **assisting or attempting to assist the enemy** with arms, ammunition, supplies, money, or any other form of assistance. **Harboring or protecting the enemy** requires that the accused, knowing the person being helped is the enemy, and without proper authority, shields him from injury or other misfortune. The protection can take any form; physical assistance or deliberate deception will both violate the article. One **gives intelligence to the enemy** by giving accurate, or impliedly accurate, information to the enemy. This is an aggravated form of communicating with the enemy, because the offense implies that the information passed has potential value to the opposition. The information need not be entirely accurate, nor must the passing of the information be directly from the accused to the enemy; however, the accused must have actual knowledge of his acts. The final offense under this article is **communication with the enemy**. Any form of unauthorized communication, correspondence, or intercourse with the enemy is prohibited, whatever the accused's intent. The content or form of the communication is irrelevant, as long as the accused is actually aware that he is communicating with the enemy. Completion of the offense does not depend on the enemy's use of the information or a return communication from the enemy to the accused; the offense is complete once the correspondence issues—either directly or indirectly—from the accused. Prisoners of war and citizens of neutral powers residing in, or visiting invaded or occupied territory can violate this article, as it applies to all persons, whether or not they are otherwise subject to military law.

6. Spying (UCMJ art. 106). This offense makes it a crime to act under false pretenses to collect, or attempt to collect, information for the enemy in areas in which people are working to aid the U.S. war effort. The prosecution must prove that the accused intended to convey information to the enemy, but need not prove that the accused actually received information or conveyed it to the enemy. Anyone, military or civilian, may be tried for spying, unless they fall into the following categories.

a. Members of an armed force or civilians who are not wearing a disguise and perform their missions openly after penetrating friendly lines.

b. Spies, who after having returned to enemy lines, are later captured.

c. Persons living in occupied territory who report on friendly activities without lurking, and without acting clandestinely or under false pretenses. Such individuals may be guilty of aiding the enemy, however.

7. Misbehavior of a Sentinel (UCMJ art. 113). A sentinel who is found drunk or asleep on his post, or who leaves his post before being properly relieved, may suffer the death penalty if the offense is committed in time of war. One is **drunk** when intoxicated sufficiently to “impair the rational and full exercise of the mental or physical faculties.” The definition of “**asleep**” requires impairment of the sentinel’s mental and physical condition, sufficient enough that, although not completely comatose, he is unable to fully exercise his faculties. The **sentinel’s post** is the area at which he is required to perform his duties. Straying from this area slightly does not amount to an offense, unless the departure would prevent the sentinel from fully executing his mission. A sentinel is posted when he is ordered to begin his duties. No formal order or ceremony is needed; it is enough that routine or standard operating procedure requires the individual to be on post at a particular time. The term applies equally in garrison, in the field, or in combat when listening posts, observation posts, forward security, and other warning devices are used.

8. Malingering (UCMJ art. 115). Soldiers who **feign illness, physical disablement, or mental impairment** or who **intentionally injure themselves** in order to avoid duty are guilty of malingering. The offense punishes those who intend to avoid work. The severity and the method of infliction of the injury are immaterial to the issue of guilt.

9. Offenses by a Sentinel (UCMJ art. 134). Sentinels are held to a high standard of conduct, especially in wartime. Thus, it is a criminal offense for a sentinel to **loiter or wrongfully sit down on his post when that conduct is prejudicial to good order and discipline or brings discredit to the armed forces**. These are criminal acts in peacetime and wartime; however, the maximum punishment is increased to a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years in time of war.

10. Straggling (UCMJ art. 134). Straggling applies in peacetime and combat to soldiers who, while accompanying their organization on a march, maneuver, or similar exercise wander away, stray, or become separated from their unit. The specification must include the specific mission or maneuver.²⁵

APPENDICES

- A. Sample Transfer of Jurisdiction
- B. Sample Letter Transferring Court-Martial Convening Authority
- C. Sample General Orders Number 1

²⁵ During Operation Urgent Fury, a platoon radio-telephone operator straggled behind the unit and eventually became so scared that he was found cowering in a ditch. He was charged with straggling (UCMJ art. 134) and endangering the safety of his platoon (UCMJ art. 99(3)).

APPENDIX A

SAMPLE TRANSFER OF JURISDICTION

(APPX ENTRY & LETTER)

APPX 7 (LEGAL AFFAIRS) TO ANNEX E (PERSONNEL AND ADMIN) TO 1ST ID (MECH) REFORGER
PLANNING DIRECTIVE (REAR DETACHMENT OPERATIONS)

REFERENCES:

- a. AR 27-10
 - b. FT Riley Supplement to AR 27-10
 - c. AR 27-20
 - d. AR 27-40
 - e. AR 27-50
 - f. AR 210-40
 - g. AR 735-11
 - h. Manual for Courts-Martial
1. SITUATION. Basic Planning Directive.
 2. MISSION. To provide legal services and support to the 1st ID (Mech) Rear (Prov) and FT Riley during REFORGER 86.
 3. EXECUTION.
 - a. General. Basic Planning Directive.
 - b. Military Justice.
 - (1) Commander, 1st ID (Mech), upon departure from FT Riley will:
 - (a) Transfer General Court Martial Convening Authority (GCMCA) for 1st ID (Mech) Rear (Prov) to the Deputy Post commander, FT Riley, Kansas, until his return from REFORGER 86.
 - (b) Transfer all cases he has referred to trial to the Deputy Post commander, FT Riley, Kansas, until his return from REFORGER 86.
 - (2) Deputy Post commander, FT Riley, will:
 - (a) Assume command of FT Riley during the absence of the commander, 1st ID (Mech) and FT Riley, for REFORGER 86.

(b) Exercise GCMCA over all service members and units assigned or attached to the 1st ID (Mech) Rear (Prov), FT Riley, and the U.S. Army Correctional Activity.

(3) Commanders of all deploying Major Subordinate Commands (MSC), 1st ID (Mech), will:

(a) Organize provisional headquarters and chain of command for rear detachments, as appropriate.

(b) Provide G3, Force Development, unit organizational structure and chain of command for respective rear detachment NLT 1 Nov 1985.

(c) Upon departure from FT Riley, transfer Special Court-Martial Convening Authority (SPCMCA) over respective rear detachments to commander, 937th Eng. Group.

(d) Upon departure from FT Riley, transfer all cases they have referred to trial to the commander, 937th Engineer Group, until their return from REFORGER 86.

(e) Insure service members facing charges that have been referred to trial are not deployed on REFORGER 86.

(4) The commander, 937th Engineer Group, will exercise SPMCA over all MSC, 1st ID (Mech), rear detachments during the absence of MSC commanders for REFORGER 86.

(5) G3, Force Development, will:

(a) Issue appropriate orders implementing the command structures of the 1st ID (Mech) Rear (Prov), and FT Riley.

(b) Issue appropriate orders attaching all provisional MSCs and rear detachment personnel to the 937th Engineer Group for special court-martial jurisdiction.

(6) SJA, 1st ID (Mech) and FT Riley, will:

(a) Prepare letter transferring GCMCA to the Deputy post commander for the signature of the commander, 1st ID (Mech) and FT Riley, prior to his departure for REFORGER 86.

(b) Prepare letter for MSC commanders' signatures transferring SPCMCA to the commander, 937th Engineer Group, prior to their departure for REFORGER 86.

(c) Assist G3 in establishment of rear detachment jurisdiction and publication of appropriate attachment orders.

c. Legal Assistance, Administrative Law, Claims.

The SJA, 1st ID (Mech) and FT Riley, will maintain sufficient staffing to provide full legal support in all areas of responsibility to the 1st ID (Mech) Rear (Prov) and FT Riley during REFORGER 86.

4. SERVICE SUPPORT. Basic Planning Directive.

5. COMMAND AND SIGNAL. Basic Planning Directive.

APPENDIX B

ORDER TRANSFERRING SPECIAL COURT-MARTIAL JURISDICTION.

SUBJECT: Order Transferring Special Court-Martial Jurisdiction.

1. Effective 0001 hours, _____ Jan 1999, I hereby order the transfer, to the commander 937th Engineer Group, 1st ID (Mech), of special court-martial jurisdiction over all court-martial cases referred to trial by the command and all new cases coming into existence on, and after, the date of this order.
2. The departure of the _____ (Brigade/DIVARTY/DISCOM) for REFORGER 86 causes the transfer of special court-martial convening authority.
3. The return of the _____ (Brigade/DIVARTY/DISCOM) from REFORGER 86 will rescind this order.

APPENDIX C

DESERT SHIELD GENERAL ORDER NO. 1

OPER/DESERT SHIELD/MSGID/ORDER/USCINCCENT

SUBJECT: DESERT SHIELD GENERAL ORDER

ACTIVITIES FOR U.S. PERSONNEL SERVING IN CENTRAL COMMAND

1. This message transmits USCINCENT Desert Shield General Order No. 1. It is applicable to all U.S. military personnel and to us persons serving with or accompanying the Armed Forces in the USCENTCOM AOR deployed or acting in support of Operation Desert Shield. Commanders are directed to readdress this order to their units and ensure widest dissemination to the lowest levels of command.

2. Statement of military purpose and necessity. Operation Desert Shield places U.S. Armed Forces into USCENTCOM AOR countries where Islamic Law and Arabic customs prohibit or restrict certain activities that are generally permissible in Western societies. Restrictions upon these activities are essential to preserving U.S. - host nation relations and the combined operations of U.S. and friendly forces. Commanders and supervisors are expected to exercise discretion and good judgment in enforcing this General Order.

3. THE FOLLOWING ACTIVITIES ARE PROHIBITED!

- a. Taking of war trophies.
- b. Purchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.
- c. Entrance into a mosque or other site of Islamic religious significance by non-Moslems unless directed to do so by military authorities or by military necessity.
- d. Introduction, possession, use, sale, transfer, manufacture or consumption of any alcoholic beverage.
- e. Introduction, possession, transfer, sale, creation or display of any pornographic photograph, videotape, movie, drawing, book or magazine or similar representations. For purposes of this order, "pornographic" means any medium that displays human genitalia, uncovered women's breasts, or any human sexual act. It is intended to include not only "obscene items," but items of "art" which display human genitalia, uncovered women's breast or any human sexual act.
- f. The introduction, possession, transfer, sale, creation or display of any sexually explicit photograph, videotape, movie, drawing, book or magazine. For purposes of this order, "sexually explicit" means any medium displaying the human anatomy in any unclothed or semi-clothed manner and which displays portions of the human torso (i.e., the area below the neck, above the knees and inside the shoulder). By way of example, but not limitation, are body building magazines, swim-suit editions of periodicals, lingerie or underwear advertisement, and catalogues, as well as visual mediums which infer but do not directly show human genitalia, women's breasts, or human sexual acts.
- g. Gambling of any kind, including sports pools, lotteries and raffles.
- h. Removing, possessing, selling, defacing, destroying archeological artifacts, or national treasures.

- i. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.
4. This order is punitive. Persons subject to the Uniform Code of Military Justice may be punished under Art. 92, UCMJ for violating a lawful general order. Civilians accompanying the armed forces of the U.S. may face adverse administrative action.
5. All persons subject to this order are charged with the individual duty to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of their official duties. Individual acts of insensitivity or flagrant violations of host nation laws, regulations and customs may be punished as a dereliction of duty under Art. 92, UCMJ. Civilians accompanying the Armed Forces may face adverse administrative action.
6. Unit commanders and supervisors are charged to ensure all, repeat all, personnel are briefed on the prohibition of these activities.
7. Items that violate this General Order may be considered contraband and may be confiscated. Before destruction of contraband, commanders or law enforcement personnel should coordinate with their servicing staff judge advocate.
8. This General Order will expire upon the completion of Operation Desert Shield unless rescinded, waived or modified.
9. Because tolerance varies for some of these activities across the AOR, authority to waive or modify the prohibitions of this order relative to alcoholic beverages, sexually explicit materials and gambling is delegated to the designated commanding officers (DCO) for the respective host nation AOR countries. (See Appendix A to CENTCOM Reg. 27-2; i.e., Saudi Arabia, Egypt and Oman rests with COMUSCENTAF; Bahrain and UAE rests with COMUSNAVCENT). Staff judge advocates for the designated commanding officers are to coordinate all waivers with the USCENTCOM Staff Judge Advocate.

JTF 190 (HAITI) GENERAL ORDER NO.1

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1. TITLE: Prohibited activities of Joint Task Force 190 (JTF 190) personnel serving in the joint operations area (JOA).
 2. PURPOSE: To prohibit conduct that is to the prejudice of good order and discipline of JTF 190, is of a nature likely to bring discredit upon JTF 190, is harmful to the health and welfare of members of JTF 190, or is essential to preserve U.S. and host nation relations.
 3. APPLICABILITY: This general order is applicable to all U.S. military personnel assigned or attached to JTF 190, and all U.S. civilian personnel serving with, employed by, or accompanying forces assigned or attached to JTF 190.
 4. AUTHORITY: The Uniform Code of Military Justice (UCMJ), Title 10, United States Code, section 801 *et. Seq.*
 5. PROHIBITED ACTIVITIES:
 - a. Purchase, possession, use, or sale of privately-owned firearms, ammunition, or explosives, or the introduction of these items into the JOA.
 - b. Entrance into Haitian churches, temples, or structures conducting religious worship, or to other sites of religious significance, unless directed by a superior authority or required by military necessity.
 - c. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any alcoholic beverage without the approval of a commander in the grade of O6 or above.
 - d. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substance as defined by Article 112a, UCMJ, and Schedules I through V of the Controlled Substance Act of 1970, 21 USC Section 812.
 - e. Gambling of any kind, including sports pools, lotteries, and raffles.
 - f. Removing, possessing, selling, defacing, or destroying archeological artifacts or national treasures.
 - g. Selling, bartering, or exchanging currency other than at the official exchange rate, if any.
 - h. Taking or retention of individual souvenirs or trophies
 - (1) Explanation of prohibition:
 - (a) Private property may be seized during combat operations only on order of a commander based on military necessity. The wrongful taking of private property, even temporarily, violates Article 121, UCMJ.
 - (b) Public property captured by U.S. personnel is the property of the U.S.. Wrongful retention of such property by an individual violates Article 108, UCMJ.
 - (c) No weapon, munition, or military article of equipment captured or acquired by any means other than official issue may be retained for personal use or shipped out of the JOA for personal retention or control.

- i. Selling, reselling, loaning, or otherwise transferring rationed or controlled items or relief supplies outside official relief channels.
 - j. Throwing at civilians any food items, including candy or Meals Ready to Eat (MREs), or any beverage, including water, from moving vehicles.
 - k. Do not engage in any sexual conduct or contact with any member of the Haitian populace.
 - l. Adopting as pets or mascots, caring for, or feeding any type of domestic animal (e.g., dogs or cats) or any type of wild animal. These animals may be infected with a variety of diseases that can be transmitted from animals to humans, and can harbor organisms capable of transmitting diseases to humans (including rabies) that have a high potential for adversely affecting the health of the command.
 - m. Eating food or drinking beverages grown or produced, prepared or served by local Haitian vendors, restaurants, or facilities. Only food and beverages approved by the Commander, JTF 190, or his designee, may be consumed by JTF 190 personnel.
6. FURTHER RESTRICTIONS: Providing food items directly to or feeding civilian refugees. Odd items may be donated to Humanitarian Relief Organizations (HROs) engaged in humanitarian relief efforts after appropriate medical inspection and release approval by an O5 commander. This provision does not prohibit the distribution of small items, such as pieces of candy, to civilian refugees when such distribution is approved by the individual's supervising NCO or officer and is under conditions that are safe both for the recipients and the military personnel involved. (See paragraph 5j above).
7. PUNITIVE ORDER: Paragraph 5 of this General Order is punitive in nature. Persons subject to the UCMJ may be court-martialed or receive adverse administrative action, or both, for violations of this General Order. Likewise, civilians serving with, employed by, or accompanying JTF 190 may face criminal prosecution or adverse administrative action for violation of this General Order.
8. INDIVIDUAL DUTY: All persons subject to this General Order are charged with the duty to become familiar with this General Order and local laws and customs. The JTF 190 mission places U.S. Armed Forces and civilian personnel into a country whose laws and customs prohibit or restrict certain activities which are generally permissible in the United States. All personnel shall avoid action, whether or not specifically prohibited by this General Order, which might result in or reasonably be expected to create the appearance of a violation of this General Order or local law or customs.
9. UNIT COMMANDER RESPONSIBILITIES: Commanders and civilian supervisors are charged with ensuring that all personnel are briefed on the prohibitions and requirements of this General Order. Commanders and supervisors are expected to exercise good judgment in reinforcing this General Order.
10. CONFISCATION OF CONTRABAND: Items which are determined to violate this General Order and or constitute contraband may be confiscated. Commanders, supervisors, military customs inspectors, and other officials will enforce this General Order in their inspections of personnel and equipment prior to and during deployment to the JOA and upon deployment from the JOA. Before destruction of contraband, commanders or law enforcement personnel will coordinate with their Staff Judge Advocate.
11. EFFECTIVE DATE: This General Order is effective upon the date of the assumption of command of Joint Task Force 190 and the MNE by the undersigned.
12. EXPIRATION: This General Order will expire when rescinded by the Commander, JTF 190, or higher authority.
13. WAIVER REQUESTS: Requests to waive prohibitions of this General Order must be coordinated with the JTF 190 Staff Judge Advocate.

ALLIED FORCE/ALLIED HARBOR (Balkans) General Order No. 1

General Order 1 in Support of Allied Force and Humanitarian Efforts in the Balkans

(Taken from USCINCEUR VAIHINGEN GE msg 122330 APR 99)

This is a lawful general order approved, issued, and published by USCINCEUR

1. Title: Prohibited Activities For U.S. Personnel Deployed In The Region Of The Former Yugoslavia In Support Of Allied Force And Humanitarian Efforts In The Balkans.

2. Authority: Title 10 United States Code section 164(c)(1)(f) and the Uniform Code of Military Justice (UCMJ)(Title 10 United States Code sections 801-940).

3. Applicability: This general order is applicable to all U.S. military and civilian personnel serving with or accompanying the armed forces of the United States deployed in support of NATO Operation ALLIED FORCE or NATO Humanitarian Operation ALLIED HARBOR, deployed to the land, territorial seas and airspace of Albania and the nations which formerly comprised the nation of Yugoslavia, to include Croatia, Bosnia-Herzegovina, Macedonia, Serbia and Montenegro. This general order does not cover individuals assigned or attached to SFOR. With regard to military members this general order is punitive. With regard to civilian personnel it may serve as the basis for adverse administrative action in case of violation of its provisions.

4. Statement of Military Purpose and Necessity: Restrictions upon certain activities are essential to maintain the security, health and welfare of U.S. forces; to prevent conduct prejudicial to good order and discipline or of a nature to bring discredit upon the U.S. forces; and to improve U.S. relations within the region. These restrictions are essential to preserve U.S. relations with host nations and other friendly forces. Furthermore, current operations place U.S. armed forces in countries where local law and customs prohibit or restrict certain activities. This general order to ensure good order and discipline are maintained and host nation laws are respected to the maximum extent consistent with mission accomplishment.

5. Prohibited Activities:

5a. Taking, possessing, or shipping captured, found or purchased weapons without legal authority or for personal use. "Without legal authority" means an act or activity undertaken by U.S. personnel that is not done at the direction of a commander or as a result of military necessity during the performance of military duties.

5b. Introduction, possession, use, sale, transfer, manufacture, or consumption of any alcoholic beverage or controlled substance. Individuals are authorized to consume alcoholic beverages, e.g., toasts, whenever refusal to do so would offend most nation military or civilian officials,

5c. Possessing, touching, using, or knowingly approaching without legal authority any unexploded munitions or ordnance, of any kind or description whatsoever.

5d. Purchase, possession, use, sale, or introduction of privately owned firearms, ammunition, and explosives.

5e. Gambling of any kind, including betting on sports, lotteries and raffles.

5f. Selling, bartering, or exchanging any currency other than at the official host nation exchange rate.

5g. Entrance into a religious shrine or mosque unless approved by or directed by military authorities or compelled by military necessity.

5h. Removing, possessing, selling, transferring, defacing, or destroying archeological artifacts or national treasures.

5i. Participating in any form of political activity of the host nation, unless directed to do so as part of the mission.

5j. Taking or retaining public or private property as souvenirs of the operation. Legitimately purchased souvenirs, other than weapons, munitions, or items prohibited by customs regulations are authorized.

6. Punitive Order: To reiterate, this order is punitive. Persons subject to the Uniform Code of Military Justice who violate this order may be punished under Article 92, UCMJ, for violating a lawful general order. Civilians accompanying the U.S. armed forces may face adverse administrative actions for violations.

7. Individual Duty: Persons subject to this general order are charged with the individual duty to become familiar with and to respect, the laws, regulations, and customs of the host nation insofar as they do not interfere with the execution of their official duties. Individual acts of disrespect or flagrant violations of host nation laws, regulations, and customs may be punished as a violation of the UCMJ for military members and may lead to adverse administrative action against civilians who violate its provisions. Commanders should remind servicemembers of their responsibilities under the code of conduct and the provisions of the international law of armed conflict.

8. Unit Commander Responsibility: Unit commanders and supervisors are to ensure that all personnel are briefed on the contents of this general order.

9. Contraband: Items determined to violate this general order may be considered contraband and may be confiscated. Before destruction of contraband, commanders, or law enforcement personnel should coordinate with their servicing staff judge advocate.

10. Effective Date: This general order is effective immediately. An amnesty period of 72 hours is granted, from the effective date of this general order, for personnel to surrender or dispose of items that violate this general order. Individuals or commanders may arrange for safekeeping of personal firearms with their unit military law enforcement activity. There is no amnesty period for alcoholic beverages.

11. Expiration: This general order will expire upon the completion of operations unless it is rescinded, waived or modified.

12. Waiver Authority: Mission requirements may permit and host nation tolerance may allow for the consumption of alcohol in certain portions of the area of operations. Therefore, authority to waive or modify the prohibitions of this order relative only to alcoholic beverages is delegated to Joint Task Force Commanders. When waiver or modification is granted, commanders who grant such waivers will notify DCINC USEUCOM immediately. Requests for waiver of other provisions beyond their authority will be directed to DCINC USEUCOM.

13. Staff judge advocates for the waiver authorities will provide the USEUCOM judge advocate with copies of all waivers granted to this order.

14. When commanders inform subordinates of the provisions of this general order, they will also inform them that I am personally very proud of their courage, professionalism and dedication to duty under very difficult circumstances. Make no mistake about it, the tasks we are undertaking are difficult and will call for personal sacrifice. Nevertheless, I know that when our servicemembers are called upon to make

personal sacrifices as representatives of their country they always perform selflessly and brilliantly. I cannot over-emphasize the trust, faith and confidence I have in them. They will get the mission done with skill and expertise out of a sense of duty and patriotism. What they are doing they are doing for America. I know that when participants look back on their role in this worthy endeavor, whether it be fighting for their country or helping to feed and care for the dispossessed in this strife-torn part of the world, that it will be with pride. They will know that their sacrifice made a difference in the lives of those in need.

Signed, Wesley K. Clark, Commander-in-Chief, U.S. European Command, General, U.S. Army.

